

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LIONEL BEAUCHAMP,

Defendant-Appellant.

UNPUBLISHED

March 16, 2006

No. 257025

Wayne Circuit Court

LC No. 04-003287-01

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, and second-degree murder, MCL 750.317. Defendant was accused and convicted of hiring his cousin, Vaudi Higginbotham, to kill DuJuan Gilchrist and Chaz Richards. Defendant was sentenced to life in prison for the first-degree murder conviction, and he was sentenced to 25 to 40 years in prison for the second-degree murder conviction. We affirm.

Defendant first argues that the prosecution committed misconduct through improper questioning and argument, and “bolstering” the testimony of the key prosecution witness. Defendant did not preserve these claimed errors by “timely and specifically object[ing]” to the allegedly improper conduct below. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 95 (2002). We review for plain error affecting the defendant’s substantial rights, and we will only reverse if the “error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant’s innocence.” *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Issues of prosecutorial misconduct are considered “on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of the defendant’s argument.” *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Here, the prosecution asked police officers if there was a warrant for defendant’s arrest:

Q. These are for all people. There is actually warrants. They are not just people that are wanted on probable cause; is that correct?

A. No, warrants.

The prosecutor also asked whether defendant, Loyce Pryor (a co-conspirator who assisted Higginbotham), and Higginbotham had been bound over for trial. The witness responded that at the time in question, early 2001, only Higginbotham was bound over for trial. In his closing argument, the prosecutor argued:

Ultimately they went to exam. Ultimately they got bound over. It was based on the statement of Mr. Higginbotham. But in March of 2001, or later on in 2001, the case against Mr. Beauchamp, Jr., and Mr. Pryor is dismissed, because Mr. Higginbotham's statement can't be used against them.

Defendant contends that these questions and remarks “suggest there is more information, outside of the record before the jury, that verifies and supports [Higginbotham's] in-court testimony.” We disagree.

The procedural history of this case was unusual, complex, and lengthy. Defendant questioned the authorities' handling of the case, referencing actions of the police “four years back,” emphasizing the length of time between the killings and the trial, and bringing up the first preliminary examination that led to the case against defendant initially being dismissed. The jurors would naturally have been confused or skeptical of the procedural history. The prosecution legitimately sought to explain to the jury the sequence of events that comprised the proceedings against Higginbotham, Pryor, and defendant. The prosecution therefore presented evidence of why the case had taken so long, including the fact that independent factors impeded the authorities from trying defendant earlier, and provided a procedural chronology in its closing argument to help the jurors collate in their minds the testimony of numerous witnesses. The prosecution may respond to the defense's arguments. *Rodriguez, supra* at 32. Further, none of the prosecutor's statements suggested any special knowledge that Higginbotham was testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). In any event, the trial court instructed the jury that questions, statements, and arguments of counsel are not evidence, and in the absence of any indication to the contrary, we presume the jury followed this instruction. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that it was improper for the prosecutor to question Shumbay Johnson, a defense witness, about his having “maxed out” his prison term without parole. We disagree. Johnson was asked about being “discharged on the max without parole” to show that he could not have been free at the time of the fire that the defense contended was Higginbotham's motive for killing Gilchrist. For the same reasons, we find no plain error requiring reversal.

Defendant next argues that his trial counsel were ineffective by failing to use at trial two letters allegedly written by Higginbotham in February and March 2004, the second of which stated that defendant had nothing to do with the killings. We disagree.

On remand from this Court, the trial court held an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), and it found there was ineffective assistance of counsel. We review the trial court's findings of fact for clear error and findings of law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant must show that counsel's performance

was objectively unreasonable and “that there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Here, we cannot conclude that trial counsel’s performance was defective for failing to seek admission of the letters or that doing so would have affected the outcome of defendant’s trial. The letters were not authenticated by Higginbotham, so they were inadmissible under MRE 901. Indeed, the trial court acknowledged that it is unclear whether Higginbotham even wrote the letters. The only possible use of them would have been to admit the statement in the second letter, “I know that you had nothing to do with these murders,” for the truth of the matter asserted therein. Thus, it constitutes hearsay, MRE 801, and it is not within any exception that would make it admissible. Although impeachment is a non-hearsay use, MRE 801(c), the statement nevertheless could not have been brought in through the “back door” without again presenting that statement for the truth of the matter asserted. Because the letters were inadmissible, counsel cannot be faulted for failing to “advocate a meritless position.” *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). In light of Higginbotham’s sworn testimony and the other circumstantial evidence of defendant’s connection to the murders, it is doubtful that the letters would have affected the outcome of the proceedings even if admitted, particularly because “[t]here is no form of proof so unreliable as recanting testimony.” *People v Van Den Dreissche*, 233 Mich 38, 46; 206 NW 339 (1925), quoting *People v Shilitano*, 218 NY 161, 170; 112 NE 733 (1916).

Defendant next argues that the trial court erred in denying his motion for directed verdict because the prosecution failed to present sufficient evidence of premeditation. We disagree.

We review de novo the evidence presented by the prosecutor, in the light most favorable to the prosecutor, to determine whether such evidence could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002). The elements of first-degree murder are that the defendant’s actions caused the victim’s death, the defendant intended to kill the victim, and “the act of killing was premeditated and deliberate.” *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). “Although there is no specific time requirement, sufficient time must have elapsed to allow the defendant to take a ‘second look.’” *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). *Plummer* described the “factors to be considered to establish premeditation” as follows:

(1) the previous relationship between the defendant and the victim; (2) the defendant’s actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. [*Plummer*, *supra* at 300.]

Here, defendant told Higginbotham to kill Gilchrist because defendant thought Gilchrist had stolen his car. Defendant promised to pay Higginbotham \$500. The plan to kill Gilchrist was formulated a few days before the shooting, when defendant believed his car had been stolen. On the day of the shooting, defendant twice instructed Higginbotham to perform the killing in his absence while he left the scene for various reasons, and they even discussed what weapon to use.

Defendant took the time to promise Higginbotham another \$500 to kill Richards, which was sufficient time to allow defendant to take a “second look.” Defendant’s actions after the crime, i.e., his flight, do not refute that defendant premeditated the killings. A rational jury could have concluded that defendant premeditated Gilchrist’s and Richards’ murders.

Defendant separately argues that there was insufficient evidence of premeditation. As discussed immediately *supra*, we disagree.

Defendant finally argues that the trial court erred in admitting into evidence a photograph of Gilchrist’s dead body. Defendant alleges that the gruesome nature of the photograph substantially outweighed any probative value. MRE 403. We disagree.

We ordinarily review a trial court’s decision whether to admit evidence for an abuse of discretion, but where that decision involves a preliminary question of law, we review the trial court’s resolution of the legal question de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Photographs of a murder victim are “not inadmissible merely because they accurately portrayed a brutal murder.” *Herndon, supra* at 414. Photographs that do not present an enhanced or altered presentation of the injuries, though graphic, may be admissible. *People v Mills*, 450 Mich 61, 77; 537 NW2d 909, mod 450 Mich 1212 (1995). The photograph here was taken from some distance away and did not particularly emphasize the gore, nor did it show the entirety of the large pool of blood coagulated below Gilchrist’s head. It provided the jury with a visual depiction of the scene of the murder, and the position of the body is plausibly consistent with the prosecutor’s theory that defendant had hired Higginbotham to conduct an “execution” style murder of Gilchrist. Although unpleasant, we do not find that the trial court abused its discretion in finding that its prejudicial effect did not substantially outweigh its probative value.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot